No. 88-653

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

ELLA MAE WELLS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioners' claim that the Deputy Administrator of the Environmental Protection Agency was negligent in his decision to conduct further study on acceptable levels of lead pollution before ordering remedial action against polluters.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bacon v. *United States*, 810 F.2d 827 (8th Cir. 1987)	6
Barnson v. *United States*, 816 F.2d 549 (10th Cir. 1987), cert. denied, No. 87-104 (Oct. 13, 1987)	5
Baxley v. *United States*, 767 F.2d 1095 (4th Cir. 1985)	5
Begay v. *United States*, 768 F.2d 1059 (9th Cir. 1985)	5
Berkovitz v. *United States*, No. 87-498 (June 13, 1988)	4
Cisco v. *United States*, 768 F.2d 788 (7th Cir. 1985)	4, 6
Consolidated United States Atmospheric Testing Litigation, In re, 820 F.2d 982 (9th Cir. 1987), cert. denied, No. 87-953 (Feb. 29, 1988)	5
Cunningham v. *United States*, 786 F.2d 1445 (9th Cir. 1986)	5
Dalehite v. *United States*, 346 U.S. 15 (1953)	6
Feyers v. *United States*, 749 F.2d 1222 (6th Cir. 1984), cert. denied, 471 U.S. 1125 (1985)	5
General Pub. Utilities Corp. v. *United States*, 745 F.2d 239 (3d Cir. 1984), cert. denied, 469 U.S. 1228 (1985)	5
Hylin v. *United States*, 755 F.2d 551 (7th Cir. 1985)	5
Merklin v. *United States*, 788 F.2d 172 (3d Cir. 1986)	5
Russell v. *United States*, 763 F.2d 786 (10th Cir. 1985)	5
Shuman v. *United States*, 765 F.2d 283 (1st Cir. 1985)	5
United States v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984)	3, 4

Statutes:

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. (& Supp. IV) 9601 *et seq.*	4
42 U.S.C. (& Supp. IV) 9604	4

Statutes – Continued: Page

42 U.S.C. 9606(a) 4
Federal Tort Claims Act, 28 U.S.C. 2680(a) 2
Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.* 4

Miscellaneous:

Hazardous Waste Contamination of Water Resources (EPA Implementation of the Superfund Program and Lead Pollution Problems in Dallas, TX): Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation, 98th Cong., 1st Sess. (1983) 2, 6, 7, 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 851 F.2d 1417. The opinion of the district court (Pet. App. 19a-41a) is reported at 655 F. Supp. 715.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1988 (Pet. App. 17a-18a). The petition for a writ of certiorari was filed on October 17, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are 571 individuals who reside in Dallas, Texas near three lead manufacturing companies. They brought this Federal Tort Claims Act (FTCA) suit seeking over $200 million in damages for personal injuries and

property damage allegedly suffered as a result of negligent acts and omissions by the Environmental Protection Agency (EPA) in monitoring, evaluating, and regulating lead pollution hazards in their neighborhood. Before the district court (Pet. App. 25a-26a) and the court of appeals (*id.* at 4a), petitioners focused their allegations upon the allegedly negligent decision of Dr. John Hernandez, the Deputy Administrator of the EPA, to conduct further study on acceptable levels of lead pollution before ordering, or accepting a proposal for, a cleanup by the lead manufacturers.[1]

2. The district court granted the government's motion to dismiss, holding that the EPA regulatory activity challenged as wrongful by petitioners fell within the discretionary function exception to the FTCA, 28 U.S.C. 2680(a). After surveying the statutes that confer authority upon the EPA, the district court concluded (Pet. App. 36a) that the EPA was granted "wide judgmental latitude * * * in its determination of what, if any, action need be taken in response to a particular environmental concern." Since Congress has "left EPA to decide the manner and the extent to which it will protect individuals from exposure to hazardous wastes," the court ruled (*id.* at 38a), EPA's regulatory activity in managing the lead pollution problem in Dallas could not give rise to liability under the FTCA.

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[1] To amplify and substantiate their allegations, petitioners relied entirely upon testimony at hearings before a House of Representatives subcommittee. See *Hazardous Waste Contamination of Water Resources (EPA Implementation of the Superfund Program and Lead Pollution Problems in Dallas, TX): Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation*, 98th Cong., 1st Sess. (1983) [hereinafter *Hearings*].

The district court rejected (Pet. App. 32a-33a) petitioners' contention that the EPA's conduct did not implicate policy considerations but rather represented negligent "objective" scientific determinations. "On the contrary," the district court stated (*id.* at 33a), "the acts and omissions charged here comprised the formulation of regulatory policy—whether and to what extent EPA should enforce environmental and health standards." Relying upon this Court's decision in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), the district court held that the EPA was not liable under the FTCA because " '[w]hen an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind.' " Pet. App. 33a (quoting 467 U.S. at 819-820).

3. The court of appeals affirmed. The court rejected (Pet. App. 12a-13a) petitioners' contention that the EPA decision was based only on scientific considerations and thus did not fall within the discretionary function exception. The court noted that the House hearings upon which petitioners relied themselves demonstrated that various economic, social, and political factors were expressly taken into account by Dr. Hernandez. "In making the decision to further study the problem," the court noted (*id.* at 4a), Dr. Hernandez was concerned that by acting precipitously "he would implicitly be establishing a precedent that might be too stringent to be applied generally * * *." The court accordingly held (*id.* at 13a) that "[t]he discretionary function exception precludes liability in this case because Dr. Hernandez was exercising permissible discretion based on policy considerations in deciding to order further study."

ARGUMENT

1. The statutes authorizing regulatory and enforcement activities by the EPA grant broad judgmental discretion to the agency in determining how to respond to particular environmental problems. Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. (& Supp. IV) 9601 *et seq.*, the government is given authority to "select" and "balance" a wide variety of measures and to undertake such action as is "deemed necessary" in response to particular environmental contingencies. See, *e.g.*, 42 U.S.C. (& Supp. IV) 9604, 9606(a). The Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*, also provides the EPA broad authority to perform certain regulatory activities affecting hazardous waste management and disposal. See generally *Cisco* v. *United States*, 768 F.2d 788, 789 (7th Cir. 1985).

The court of appeals was thus plainly correct in its conclusion that the EPA's decision to conduct further studies before taking specific action to correct high lead concentrations in petitioner's neighborhood was protected from suit by the discretionary function exception. Determining how to respond to a particular environmental hazard necessarily entails broad discretion in the application of various policy considerations to individual circumstances. The discretionary function exception was expressly designed to insulate from tort suits such "administrative decisions grounded in social, economic, and political policy" (*Varig Airlines*, 467 U.S. at 814).

Petitioners do not claim that the EPA violated any statutes or regulations in deciding to conduct further studies before ordering a cleanup of lead pollution in petitioners' neighborhood. Compare *Berkovitz* v. *United States*, No. 87-498 (June 13, 1988). Nor have petitioners

contested the fact that the governing statutes allow the Deputy Administrator of EPA to exercise policy choice in making decisions of this nature. Instead, petitioners contend that the governmental decision challenged here in fact turned solely upon objective scientific factors and was not influenced by any of the social, economic, or political policy considerations that animate the discretionary function exception. That argument is plainly untenable.

Every court of appeals has held that, in the absence of any claim of a violation of statutes or regulations, the decision of a regulatory agency as to how, when, and to what extent to respond to a perceived hazard is protected from suit by the discretionary function exception.[2] Such decisions are inherently discretionary because they necessarily implicate a wide assortment of policy considerations, even if the range of available discretion is narrowed by an evaluation of objective scientific factors.

Because of the broad discretion afforded to the EPA by Congress in this context, two courts of appeals in addition to the court below have held that the discretionary function exception applies to bar actions based upon the EPA's alleged negligence in responding to particular environ-

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[2] See, *e.g.*, *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982 (9th Cir. 1987), cert. denied, No. 87-953 (Feb. 29, 1988); *Barnson* v. *United States*, 816 F.2d 549 (10th Cir. 1987), cert. denied, No. 87-104 (Oct. 13, 1987); *Merklin* v. *United States*, 788 F.2d 172 (3d Cir. 1986); *Cunningham* v. *United States*, 786 F.2d 1445 (9th Cir. 1986); *Begay* v. *United States*, 768 F.2d 1059 (9th Cir. 1985); *Baxley* v. *United States*, 767 F.2d 1095 (4th Cir. 1985); *Shuman* v. *United States*, 765 F.2d 283 (1st Cir. 1985); *Russell* v. *United States*, 763 F.2d 786 (10th Cir. 1985); *Hylin* v. *United States*, 755 F.2d 551 (7th Cir. 1985); *Feyers* v. *United States*, 749 F.2d 1222 (6th Cir. 1984), cert. denied, 471 U.S. 1125 (1985); *General Pub. Utilities Corp.* v. *United States*, 745 F.2d 239 (3d Cir. 1984), cert. denied, 469 U.S. 1228 (1985).

mental hazards. In *Bacon* v. *United States*, 810 F.2d 827, 829-830 (8th Cir. 1987), the Eighth Circuit considered a tort action premised on the EPA's failure to warn the plaintiffs of the hazards of dioxin contamination in the area. The court held that decisions concerning the adoption of environmental safety policy fell within the definition of a discretionary function. Likewise, in *Cisco* v. *United States*, 768 F.2d 788 (7th Cir. 1985), the Seventh Circuit affirmed the dismissal on discretionary function grounds of an action based on the EPA's failure to warn plaintiffs about dioxin contamination or to remove the contaminated soil. The same result follows in the present case. While scientific information contributes to an informed policy choice, the determination as to the level of pollutant contamination that justifies extraordinary remedies with significant social and economic ramifications for affected communities and businesses plainly reflects "the discretion of the executive or the administrator to act according to one's judgment of the best course." *Dalehite* v. *United States*, 346 U.S. 15, 34 (1953).

2. The House hearings, upon which petitioners themselves rely, directly contradict their argument that only non-policy, scientific factors were taken into account by the EPA in determining to conduct further study before establishing a regulatory standard. Petitioners premise their argument upon two passages of testimony from the hearings. See Pet. 2, 8. In the first exchange, Dr. Hernandez testified generally that risk level and exposure route data constituted scientific evidence that was used in making his decision to conduct further study. *Hearings* 67 (Pet. App. 47a-48a). But, as the court of appeals noted (Pet. App. 15a n.5), Dr. Hernandez "does not state that he did not consider other factors besides the two he mentioned" and "Dr. Hernandez's further comments show that he considered many nonscientific factors."

The second exchange involved testimony by subordinates of Dr. Hernandez. Representative Synder asked whether they had "any reason to believe that any actions on [Dr. Hernandez's] part were based upon anything other than his scientific judgment." *Hearings* 339 (Pet. App. 58a-59a). They each replied that they did not (*ibid.*). Petitioners cite this testimony as conclusive evidence to support their argument that only ordinary scientific decisionmaking had occurred in this case. See Pet. 8. But, again, as the court of appeals explained (Pet. App. 15a n.5), petitioners have twisted this testimony out of context. Representative Synder was actually questioning these subordinates to determine whether they knew of any "unholy alliance between Dr. Hernandez and any of the three [lead manufacturing] companies" that could have influenced his decision. *Hearings* 339 (Pet. App. 58a). In other words, the subordinates merely testified that they had no reason to believe that Dr. Hernandez's decision reflected corrupt influences as opposed to unbiased scientific judgment. The testimony is not fairly understood to mean that Dr. Hernandez reached a decision based solely upon scientific factors to the exclusion of policy considerations.

The court of appeals listed (Pet. App. 13a-14a) numerous excerpts from the House hearings that detail the various policy factors, other than purely scientific and statistical evidence, that influenced Dr. Hernandez's decision. He was concerned as to whether the level of lead found in the soil in Dallas and proposed as the basis for action in that community would be an appropriate precedent for taking similar actions in numerous other areas of the country that had higher than average lead levels in the soil. *Hearings* 317 (Pet. App. 49a). He had to balance the possibility that the immediate clean-up offer made by one of the lead smelters as a basis for a settlement of its obliga-

tions would prove inadequate in light of further studies that might show more extensive problems in other parts of the Dallas area. *Hearings* 66-67 (Pet. App. 45a-48a). His decision to conduct further study also reflected concerns of possible political criticism if the standard proposed were adopted hastily and failed to address the larger problem (*ibid.*). Finally, there was testimony that budgetary constraints also counseled against precipitous agency action. *Hearings* 320 (Pet. App. 52a-54a). Thus, petitioners' contention that policy considerations played no part in the decision in question here was properly rejected by both lower courts.[3]

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[3] Petitioners argue (Pet. 10) that, by considering the House hearings testimony as a whole, "the court below acknowledgely did not view Petitioner[s]' evidence in the light most favorable to them, and explicitly decided that the Government's evidence on the factors underlying Dr. Hernandez's decision was somehow more valid than Petitioners' evidence." Petitioners miss the point. Petitioners themselves chose to rely upon the House hearings as a way of demonstrating the counterintuitive proposition that policy considerations played no part in Dr. Hernandez's discretionary decision. The court of appeals simply did not allow petitioners to pick and choose which aspects of that hearings testimony they wished to emphasize or neglect. Petitioners are certainly correct in contending that, upon a motion to dismiss, a court must view factual allegations made in a complaint in the light most favorable to the plaintiffs. But petitioners were asking the courts below to reach absurd conclusions that could only be justified by permitting petitioners to twist quotations out of context in an attempt to confer meaning and significance that the testimony as a whole precluded.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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